A

VIRAN NAGAPAN v. DEEPA SUBRAMANIAM & OTHER APPEALS

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF PCA
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)
B ABDULL HAMID EMBONG FCJ
SURIYADI HALIM OMAR FCJ
AZAHAR MOHAMED FCJ
[CIVIL APPEALS NO: 02(f)-5-01-2015, 02(f)-6-01-2015 & 02(f)-4-01-2015(N)]
C 10 FEBRUARY 2016

FAMILY LAW: *Children – Custody – Custody order – Principles – Whether could never be final or irreversible – Paramount considerations – Whether that of welfare of child – Child of seven years and above – Presumption – Whether capable of giving*
D *independent opinion – Wishes of parent(s)*

FAMILY LAW: *Children – Custody – Conversion of one parent to Islam – Conflicting custody orders granted by civil and Syariah courts – Validity of orders – Whether both orders binding and enforceable at law – Law Reform (Marriage and Divorce) Act 1976 s. 51 – Islamic Family Law (Negeri Sembilan) Enactment 2003,*
E *s. 46(2)*

FAMILY LAW: *Children – Custody – Recovery order – Conversion of one parent to Islam – Child taken away by converting parent from custody of the other parent – Conflicting custody orders granted by civil and Syariah courts – Whether civil*
F *court could grant recovery order in face of earlier custody order by Syariah court – Whether civil court could order Inspector General of Police to execute recovery order against converting parent – Child Act 2001 ss. 52, 53 – Law Reform (Marriage and Divorce) Act 1976, s. 51 – Islamic Family Law (Negeri Sembilan) Enactment 2003, s. 46(2)*

G ***CONSTITUTIONAL LAW:*** *Courts – Jurisdiction – Syariah and civil courts – Custody of children – Civil marriage – Conversion of one parent to Islam – Jurisdiction to dissolve marriage, grant custody order and ancillary orders – Whether remained with civil courts – Whether dispute not one within exclusive jurisdiction of Syariah courts – Federal Constitution art. 121(1A) – Child Act 2001, ss. 52, 53*
H *– Law Reform (Marriage and Divorce) Act 1976 s. 51 – Islamic Family Law (Negeri Sembilan) Enactment 2003, s. 46(2)*

WORDS & PHRASES: *'lawful custody of a child' – Child Act 2001, s. 53*

The appellant ('ex-husband') and the respondent ('ex-wife') were married in 2003 under the Law Reform (Marriage and Divorce) Act 1976 ('LRA').
I Their marriage was however dissolved, first by the Syariah High Court pursuant to s. 46(2) of the Islamic Family Law (Negeri Sembilan) Enactment 2003 ('Enactment 2003'), and subsequently by the Civil High Court ('High Court') pursuant to s. 51 of the LRA, when the ex-husband converted to

Islam in 2012. The facts showed however that both the Syariah High Court and the High Court, in dissolving the marriage, had granted a permanent custody order in respect of the couple's two children ('Mithran and Shamila'), *albeit* that, whilst the former gave custody to the ex-husband, the latter granted it to the ex-wife. Be that as it may, following the High Court order granting custody of the children to the ex-wife, the ex-husband took Mithran away from the ex-wife's house, and then filed an appeal against the said decision of the High Court. The ex-wife responded by obtaining from the High Court a recovery order pursuant to s. 53 of the Child Act 2001 ('the Child Act'), and with that, an order for the Inspector General of Police ('IGP') to execute the said recovery order against the ex-husband. Against this decision of the High Court, the ex-husband had also appealed. Both appeals were however dismissed by the Court of Appeal, whereupon the ex-husband appealed further (by leave) and posed two questions of law to the Federal Court, namely: (1) whether in the contexts of art. 121(1A) of the Federal Constitution, where a custody order was made by the Syariah Court or the Civil Court on the basis that it had jurisdiction to do so, there is jurisdiction for the other court to make a conflicting order; and (2) whether on the interpretation of ss. 52 and 53 of the Child Act, a recovery order could be made when there exists a custody order given by the Syariah Court which was enforceable at the same time. Incidentally, however, questions also arose as to (i) whether the custody order of the High Court as affirmed by the Court of Appeal ought to be preserved; and (ii) whether the High Court was correct in issuing the recovery order and ordering the IGP to execute the said order against the ex-husband.

Held (allowing appeal; answering questions in the negative)
Per Md Raus Sharif PCA delivering the judgment of the Court:

(1) A non-Muslim marriage does not automatically dissolve upon one of the parties converting to Islam. The civil courts would continue to have jurisdiction in respect of divorce as well as custody of the children despite the conversion of one party to Islam. In any case, the matter of dispute here, being a matter under the LRA, is not a matter within the jurisdiction of the Syariah High Court. Article 121(1A) of the Federal Constitution which removes the jurisdiction of the civil courts in respect of any matter within the jurisdiction of the Syariah Courts does not operate to deny the civil courts jurisdiction over matters set out in s. 51 LRA. (paras 22 & 23)

(2) Enactment 2003 is applicable only to Muslims. The Syariah Courts do not have the jurisdiction over a case even though the subject matter falls within their jurisdiction if one party is a non-Muslim. It follows further that the Syariah High Court here had no jurisdiction over the ex-husband's application to dissolve his civil marriage with the ex-wife, or over the custody of children born to such marriage. (paras 25 & 28)

(2a) Under s. 45 of Enactment 2003, the Syariah Court can only grant orders pertaining to divorce or allow the pronouncement of *talaq* where the marriage is registered or deemed to be registered under the Enactment or solemnised in accordance with Syariah Law. The marriage here was not one such marriage, it being a civil marriage under the LRA. Thus, it is the LRA that determines the jurisdiction pertaining to the dissolution of the marriage and ancillary relief thereto. The LRA would continue to bind the ex-husband despite his conversion to Islam. (paras 25 & 29)

(2b) Section 46(2) of Enactment 2003 does not confer jurisdiction on the Syariah Courts to dissolve a non-Muslim marriage. Bearing in mind *Subashini Rajasingam v. Saravanan Thangathoray*, the Syariah Court can confirm that dissolution has taken place as a result of conversion, but cannot not do anything more under the section to dissolve the marriage. It follows that the Syariah High Court had no jurisdiction to dissolve the civil marriage or to make the custody order granting the two children to the ex-husband. The jurisdiction to do that lies with the civil court. Hence, the impugned order of the Syariah High Court is of no effect for want of jurisdiction. (paras 30 & 31)

(3) Question 1 as posed to the court would be answered as follows. The civil court has the exclusive jurisdiction to grant decrees of divorce of a civil marriage under the LRA and to make all ancillary orders thereto and it is an abuse of process for the spouse who had converted to Islam to file for dissolution of the marriage and for custody of the children in the Syariah Courts. This is so as the dispute was not a matter within the exclusive jurisdiction of the Syariah Courts with the result that art. 121(1A) of the Federal Constitution, which deprived the civils courts of jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts, had no application to this case. (para 32)

(4) The paramount consideration in determining the custody of a child is the child's welfare. This is pronounced by s. 88(3) of the LRA which also makes clear that the presumption that a young child is better off with his or her mother rather than his or her father is a rebuttable presumption. This presumption too must be weighed together with other relevant factors. (paras 33, 34 & 37)

(4a) In considering the wishes of the child, the court must consider the possibility that the child might have been influenced by people surrounding the child. This said, a determination as to whether a child is able to express an independent opinion depends greatly on the circumstances peculiar to the facts of the case and the assessment of the judge in the circumstances. On the authorities, it can be presumed, subject to rebuttal, that children above the age of seven years are capable of giving independent opinion. It ought also to be noted that the wishes of the parents will not be of much significance unless it can be shown

they are in line with the welfare of the child. However, if the welfare of the child is equally balanced with the wishes of either of the parents, the wishes of the relevant parent might tip the scale. (paras, 39, 41 & 43)

(5) A custody order is never final or irreversible. In this case, a change in circumstances had occurred as Mithran was taken away from the ex-wife's house by the ex-husband and had since been with the ex-husband. Be that as it may, bearing in mind the welfare of the children, the court has taken the liberty to see Mithran and Shamila, now aged 8 and 11 years respectively, and found both to be capable of expressing their independent opinion and deciding their preference. They have indeed made their preference, and were certain of their choice, which is that Mithran had decided to live with their father while Shamila with their mother. It is also found that both children had settled down and were well-cared for, such that it is undesirable to disturb the obtaining arrangement. In the circumstances, the custody order of the High Court is varied to the extent, *inter alia*, that custody of Shamila would remain with the ex-wife while that of Mithran with the ex-husband. (paras 46 - 49)

(6) A recovery order is only applicable in circumstances provided for in s. 52 of the Child Act and can only be obtained if the elements in s. 53 thereof are fulfilled, namely that the child has been taken or sent away and that the act is done without the consent of the person having lawful custody of the child. A person has lawful custody of a child if he has been conferred custody of the child by virtue of any written law or by an order of a court including a Syariah Court. It is clear from s. 52(2) that a custody order by the Syariah Court is a lawful custody order. (paras 53 & 54)

(7) In light of the existence of the two conflicting custodial orders, the High Court Judge should not have entertained the application of the ex-wife for the recovery order of Mithran from the ex-husband. Whilst this court's answer to Question 1 here means that the Syariah Courts have no jurisdiction in this case to make the custody order, the said Syariah Court order, until it is set aside, remains a valid order. Hence, the High Court Judge cannot direct the IGP or his officers to execute the High Court judgment, irrespective of the Syariah High Court order. On the facts, both orders would bind the IGP and his officers, and execution and performance of one order is impossible without being in contempt of the other. (paras 55 & 56)

(8) The recovery order should not have been given because the pertinent elements under s. 52 of the Child Act had not been fulfilled. Accordingly, Question 2 is answered in the negative, the appeal on the recovery order is allowed and the orders of the courts below is set aside. (paras 57 & 58)

A ***Bahasa Malaysia*** *Headnotes*

Perayu ('bekas suami') dan responden ('bekas isteri') berkahwin pada tahun 2003 di bawah Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 ('APU'). Perkahwinan mereka bagaimanapun dibubarkan, pertama oleh Mahkamah Tinggi Syariah di bawah s. 46(2) Enakmen Undang-
B Undang Keluarga Islam (Negeri Sembilan) 2003 ('Enakmen 2003'), dan kemudian oleh Mahkamah Tinggi Sivil ('Mahkamah Tinggi') di bawah s. 51 APU, apabila bekas suami memeluk Islam pada tahun 2012. Fakta menunjukkan bahawa kedua-dua Mahkamah Tinggi Syariah dan Mahkamah Tinggi, dalam membubarkan perkahwinan, telah mengeluarkan perintah
C jagaan kekal ke atas dua orang anak mereka ('Mithran dan Shamila'). Cumanya, sementara Mahkamah Tinggi Syariah memberikan hak jagaan kepada bekas suami, Mahkamah Tinggi pula memberikan hak tersebut kepada bekas isteri. Apapun, ekoran dari perintah Mahkamah Tinggi memberikan hak jagaan kepada bekas isteri, bekas suami telah mengambil
D keluar Mithran dari rumah bekas isteri, dan kemudian memfailkan rayuan terhadap keputusan Mahkamah Tinggi tersebut. Bekas isteri membalas dengan memperolehi perintah mendapat balik dari Mahkamah Tinggi di bawah s. 53 Akta Kanak-Kanak 2001 ('Akta Kanak-Kanak'), dan melaluinya, satu perintah agar Ketua Polis Negara ('KPN') menguatkuasakan
E keputusan mahkamah tersebut terhadap bekas suami. Keputusan Mahkamah Tinggi ini juga dirayui oleh bekas suami. Kedua-dua rayuan bagaimanapun ditolak oleh Mahkamah Rayuan, berakibat bekas suami merayu seterusnya (dengan kebenaran) dan mengemukakan dua soalan undang-undang kepada Mahkamah Persekutuan, iaitu: (1) sama ada dalam konteks per. 121(1A)
F Perlembagaan Persekutuan, di mana satu perintah jagaan dibuat oleh Mahkamah Syariah atau Mahkamah Sivil atas alasan bahawa ia berbidang kuasa untuk berbuat demikian, bidang kuasa wujud bagi mahkamah yang satu lagi untuk membuat satu perintah yang bertentangan; dan (2) sama ada berdasarkan pentafsiran ss. 52 dan 53 Akta Kanak-Kanak, satu perintah mendapatkan balik boleh dibuat walaupun terdapat satu perintah jagaan yang
G dikeluarkan oleh Mahkamah Syariah yang boleh dikuatkuasakan pada masa yang sama. Secara tidak langsung, persoalan juga berbangkit mengenai (i) sama ada perintah mendapatkan balik Mahkamah Tinggi seperti yang disahkan oleh Mahkamah Rayuan harus dikekalkan; dan (ii) sama ada Mahkamah Tinggi di bawah betul dalam mengeluarkan perintah
H mendapatkan balik dan memerintahkan KPN untuk menguatkuasakan perintah tersebut terhadap bekas suami.

Diputuskan (membenarkan rayuan; menjawab soalan-soalan secara negatif)

Oleh Md Raus Sharif PMR menyampaikan penghakiman mahkamah:

I

(1) Satu perkahwinan bukan Islam tidak terbubar secara automatik apabila salah satu pihak memeluk Islam. Mahkamah Sivil masih mempunyai bidang kuasa berkaitan dengan perceraian dan hak jagaan anak walaupun dengan pengislaman satu pihak perkahwinan tersebut. Apapun, hal

perkara yang menjadi pertikaian di sini, yang merupakan hal perkara di bawah APU, bukanlah satu hal perkara yang termasuk dalam bidang kuasa Mahkamah Syariah. Ianya mengikut bahawa per. 121(1A) Perlembagaan Persekutuan yang menyingkir bidang kuasa Mahkamah Sivil berhubung apa-apa perkara yang berada di bawah bidang kuasa Mahkamah Syariah tidak beroperasi untuk menyangkal bidang kuasa Mahkamah Sivil berkaitan hal perkara-hal perkara yang disebut dalam s. 51 APU.

(2) Enakmen 2003 hanya terpakai kepada orang-orang Islam. Mahkamah Syariah tiada bidang kuasa ke atas kes walaupun hal perkara pertikaian termasuk di bawah bidang kuasa mereka jika salah satu pihak adalah orang bukan Islam. Ianya mengikut seterusnya bahawa Mahkamah Syariah di sini tiada bidang kuasa ke atas permohonan bekas suami untuk membubarkan perkahwinan sivil dengan bekas isteri, mahupun ke atas hak jagaan anak-anak dari perkahwinan tersebut.

(2a) Di bawah s. 45 Enakmen 2003, Mahkamah Syariah hanya boleh memberi perintah berkaitan perceraian atau membenarkan lafaz talak jika perkahwinan didaftar atau dianggap didaftar di bawah Enakmen atau dilangsungkan berdasarkan Undang-Undang Syariah. Perkahwinan di sini bukan perkahwinan yang sedemikian, kerana ia satu perkahwinan sivil di bawah APU. Oleh itu, APU yang akan menentukan bidang kuasa mengenai pembubaran perkahwinan tersebut atau mengenai relif-relif sampingannya. APU terus mengikat bekas suami walaupun setelah beliau memeluk Islam.

(2b) Seksyen 46(2) Enakmen 2003 juga tidak memberi bidang kuasa kepada Mahkamah Syariah untuk membubarkan satu perkahwinan bukan Islam. Mengambil kira *Subashini Rajasingam v. Saravanan Thangathoray*, Mahkamah Syariah boleh mengesahkan bahawa pembubaran telah berlaku disebabkan oleh pengislaman, tetapi tidak boleh berbuat apa-apa lagi di bawah seksyen untuk membubarkan perkahwinan. Ianya mengikut bahawa Mahkamah Tinggi Syariah tidak berbidang kuasa untuk membubarkan perkahwinan atau membuat perintah memberikan jagaan kedua-dua anak kepada bekas suami. Bidang kuasa untuk berbuat demikian adalah terletak pada Mahkamah Sivil. Oleh itu, perintah dipertikai Mahkamah Tinggi Syariah adalah tidak berkesan kerana ketiadaan bidang kuasa.

(3) Soalan 1 seperti yang dikemuka ke mahkamah boleh dijawab seperti berikut. Mahkamah sivil mempunyai bidang kuasa eksklusif untuk mengeluarkan perintah perceraian bagi satu perkahwinan sivil di bawah APU serta mengeluarkan perintah-perintah sampingannya, dan adalah satu salah guna proses bagi pihak yang memeluk Islam untuk memfailkan permohonan untuk membubarkan perkahwinan di Mahkamah Syariah. Ini kerana pertikaian bukanlah satu perkara yang

termasuk ke dalam bidang kuasa eksklusif Mahkamah Syariah, yang bermakna per. 121(1A) Perlembagaan Persekutuan, yang menyingkir bidang kuasa mahkamah sivil dari perkara-perkara yang termasuk dalam bidang kuasa Mahkamah Syariah, tidak terpakai kepada kes di sini.

(4) Pertimbangan paling utama dalam menentukan hak jagaan seseorang kanak-kanak adalah kebajikannya. Ini ditetapkan oleh s. 88(3) APU yang juga menjelaskan bahawa anggapan bahawa seseorang kanak-kanak itu lebih baik dijaga oleh ibu berbanding bapanya adalah anggapan yang boleh dipatahkan. Anggapan ini juga harus dipertimbang bersama dengan faktor-faktor lain yang relevan.

(4a) Dalam memberi pertimbangan kepada kemahuan kanak-kanak, mahkamah mestilah mengambil kira bahawa kanak-kanak tersebut mungkin dipengaruhi oleh orang-orang di kelilingnya. Apapun, bagi menentukan sama ada seorang kanak-kanak itu mampu menzahirkan pendapat yang bebas banyak bergantung kepada hal keadaan fakta sesuatu kes dan pemerhatian yang dibuat oleh hakim dalam keadaan tersebut. Berdasarkan autoriti dan tertakluk kepada hujah pematahan, anggapan boleh dibuat bahawa kanak-kanak yang berumur lebih dari tujuh tahun berupaya untuk menzahirkan pandangan yang bebas. Harus juga diingat, berkaitan hal ini, bahawa kemahuan ibu bapa tidak begitu penting kecuali jika ianya dibuktikan bahawa kemahuan itu selaras dengan kemahuan kanak-kanak. Bagaimanapun, jika kebajikan kanak-kanak sama-sama bermanfaat berbanding dengan kemahuan ibu atau bapa, maka kemahuan salah seorang darinya mungkin menjadi faktor penentu.

(5) Perintah jagaan bukanlah sesuatu yang muktamad atau tidak boleh diubah. Dalam kes ini, berlaku perubahan pada hal keadaan apabila Mithran diambil oleh bekas suami dari jagaan bekas isteri dan tinggal dengan bekas suami sejak dari itu. Walau apapun, dengan mengambil kira bahawa kebajikan kanak-kanak adalah paling utama, mahkamah memilih untuk bertemu dengan kedua-dua kanak-kanak, Mithran dan Shamila, yang kini berumur 8 tahun dan 11 tahun masing-masing, dan mendapati bahawa kedua-duanya mampu menyatakan pandangan bebas mereka dan menentukan pilihan mereka sama ada untuk tinggal dengan ibu atau bapa mereka. Malah, mereka telah membuat pilihan masing-masing, dan pasti dengan pilihan yang dibuat, iaitu bahawa Mithran memilih untuk tinggal dengan bapa mereka sementara Shamila dengan ibu mereka. Adalah juga didapati bahawa kedua-dua kanak-kanak sudah berasa selesa dengan keadaan mereka dan telah dijaga dengan baik, yang bermakna hal keadaan yang wujud tersebut tidak harus diganggu dan harus dikekalkan begitu. Oleh itu, perintah jagaan Mahkamah Tinggi diubah antara lain dengan perintah bahawa Shamila akan tinggal dengan bekas isteri manakala Mithran dengan bekas suami.

(6) Perintah mendapatkan semula hanya terpakai dalam keadaan yang diperuntukkan oleh s. 52 Akta Kanak-Kanak dan hanya boleh diperolehi jika elemen-elemen s. 53 dipenuhi, iaitu bahawa kanak-kanak telah diambil keluar dan bahawa perbuatan itu dibuat tanpa izin orang yang mempunyai hak jagaan sah terhadap kanak-kanak tersebut. Seseorang dikatakan mempunyai hak jagaan sah kanak-kanak jika ia telah diberikan hak jagaan ke atas kanak-kanak itu oleh mana-mana undang-undang bertulis atau oleh satu perintah mahkamah termasuk Mahkamah Syariah. Adalah jelas, berdasarkan s. 52, bahawa satu perintah jagaan yang dikeluarkan oleh Mahkamah Syariah adalah satu perintah jagaan yang sah.

(7) Memandangkan terdapat dua perintah jagaan yang bertentangan, Hakim Mahkamah Tinggi tidak seharusnya melayani permohonan bekas isteri untuk mendapat perintah mendapatkan semula Mithran dari bekas suami. Sementara jawapan mahkamah ini terhadap Soalan 1 bermakna bahawa Mahkamah Syariah tidak mempunyai bidang kuasa dalam kes ini untuk membuat perintah jagaan, perintah Mahkamah Syariah yang berkaitan, sebelum ianya diketepikan, masih merupakan satu perintah yang sah. Oleh itu, Hakim Mahkamah Tinggi tidak boleh mengarahkan KPN atau pegawai-pegawainya untuk menguatkuasakan keputusan Mahkamah Tinggi, tanpa mengambil kira perintah Mahkamah Tinggi Syariah. Berdasarkan fakta, kedua-dua perintah mengikat KPN dan pegawai-pegawainya dan melaksanakan mana-mana satu dari perintah tersebut adalah mustahil tanpa melakukan penghinaan terhadap yang satu lagi.

(8) Perintah mendapatkan semula tidak sepatutnya dikeluarkan kerana elemen-elemen relevan di bawah s. 52 Akta Kanak-Kanak tidak dipenuhi. Oleh itu, Soalan 2 dijawab secara negatif, rayuan terhadap perintah mendapatkan semula dibenarkan dan perintah-perintah mahkamah di bawah diketepikan.

Case(s) referred to:

B Ravandran Balan v. Maliga Mani Pillai [1995] 1 LNS 21 HC ***(refd)***
J & Anor v. C & Ors [1970] AC 688 ***(refd)***
Kung Lim Siew Wan lwn. Choong Chee Kuan [2003] 3 CLJ 482 HC ***(refd)***
Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 5 CLJ 253 FC ***(refd)***
Mahabir Prasad v. Mahabir Prasad [1981] CLJ 124A; [1981] CLJ (Rep) 65 FC ***(refd)***
Manickam v. Intherahnee [1984] 1 LNS 90 FC ***(refd)***
Re KO (an infant) [1990] 1 LNS 8 HC ***(refd)***
Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah [2004] 1 CLJ 505 HC ***(refd)***
Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1 FC ***(refd)***
Tan Sung Mooi v. Too Miew Kim [1994] 3 CLJ 708 SC ***(refd)***
Teh Eng Kim v. Yew Peng Siong [1977] 1 LNS 138 FC ***(refd)***
Tey Siew Choo v. Teo Eng Hua [1999] 6 CLJ 308 HC ***(refd)***

A **Legislation referred to:**
Child Act 2001, ss. 52(2), 53(1), (2)
Federal Constitution, arts. 121(1), (1A)
Islamic Family Law (Federal Territories) Act 1984, s. 46(2)
Islamic Family Law (Negeri Sembilan) Enactment 2003, ss. 4, 45, 46(2)
Law Reform (Marriage & Divorce) Act 1976, ss. 3(3), 51, 88(2), (3)

B *(Civil Appeal No: 02-4-01-2015 (N))*
For the appellant - Suzana Atan (Arik Sanusi Yeop Johari & Shamsul Bolhassan with her); AG's Chambers
For the respondent - Fahri Azzat (Aston Paiva & Joanne Leong with him); M/s Yeoh & Joanne

C *(Civil Appeal No: 02-5-01-2015 (N))*
For the appellant - Haniff Khatri (Kamarul Arifin Wafa, Faiz Fadzil, Mohd Tajuddin Abd Razak & Muhd Bakhtiar Roslan with him); M/s Kamarul Arifin Wafa & Assocs
For the respondent - Fahri Azzat (Aston Paiva & Joanne Leong with him); M/s Yeoh & Joanne

D *(Civil Appeal No: 02-6-01-2015 (N))*
For the appellant - Haniff Khatri (Kamarul Arifin Wafa, Faiz Fadzil, Mohd Tajuddin Abd Razak & Muhd Bakhtiar Roslan with him); M/s Kamarul Arifin Wafa & Assocs
For the respondent - Fahri Azzat (Aston Paiva & Joanne Leong with him); M/s Yeoh & Joanne

E *Watching Brief:*
Goh Siu Lin for JAG:
(i) Women's Aid Organisation (WAO)
(ii) Association of Women Lawyers (AWL)
(iii) All Women's Action Society
(iv) Perak Women for Women Society
F *(v) Persatuan Kesedaran Komuniti Selangor (EMPOWER)*
(vi) Persatuan Sahabat Wanita Selangor
(vii) Sabah Women's Action Resource Group (SAWO)
(viii) Sisters in Islam (SIS)
(ix) Tenaganita
(x) Women's Centre for Change (WCC Penang)
G *Andrew Khoo Chin Hock for:*
(i) Bar Council Malaysia
(ii) Suruhanjaya Hak Asasi Manusia (SUHAKAM)
Abdul Rahim Sinwan (Mohd Fasha Mustafa with him) for PPMM
Mohd Khairul Anuar Ismail (Mohd Raimi Abd Rahim with him) for ABIM

H *[Editor's note: For the Court of Appeal judgments, please see Viran Nagapan v. Deepa Subramaniam [2015] 3 CLJ 525 & Viran Nagapan v. Deepa Subramaniam; Peguam Negara Malaysia & Anor (Intervener) [2015] 3 CLJ 537 (orders varied).]*

Reported by Wan Sharif Ahmad

I

JUDGMENT

Md Raus Sharif PCA:

Introduction

[1] There are three (3) interrelated appeals before us, arising from the judgment of the Court of Appeal dated 17 December 2014 which dismissed the appellant's appeals. Leave to appeal was granted by this court on 14 January 2015 on the following questions of law:

(i) Whether in the context of Article 121(1A) of the Federal Constitution, where a Custody Order is made by the Syariah Court or the Civil Court on the basis that it has jurisdiction to do so, whether there is jurisdiction for the other court to make a conflicting order.

(ii) Whether on the interpretation of sections 52 and 53 of the Child Act 2001, a Recovery Order can be made when there exist a custody order given by the Syariah Court which is enforceable at the same time.

Background Facts

[2] The abovementioned questions of law flow from the following background. On 19 March 2003, the appellant (ex-husband) and the respondent (ex-wife) contracted a civil marriage under the Law Reform (Marriage & Divorce) Act 1976 (LRA). Out of the said marriage, they have two children, a girl named Shamila a/p Viran (Shamila) and a boy named Mithran a/l Viran (Mithran).

[3] On 26 November 2012, the ex-husband converted to Islam at Pusat Dakwah Islamiah, Paroi, Negeri Sembilan and changed his name to Izwan bin Abdullah. Thereafter, on 4 January 2013, the ex-husband registered the conversion to Islam of his two children, Shamila and Mithran at Pusat Dakwah Islamiah, Paroi, Negeri Sembilan and had their names changed to Nur Nabila binti Izwan and Muhammad Nabil bin Izwan, respectively.

[4] The ex-husband, upon his conversion to Islam, applied for the dissolution of his civil marriage with the ex-wife at the Seremban Syariah High Court. An order for the dissolution of the civil marriage was granted by the Syariah High Court on 15 May 2013 based on s. 46(2) of the Islamic Family Law (Negeri Sembilan) Enactment 2003 (Enactment 2003).

[5] On 26 August 2013, the ex-husband was granted temporary custody order of his two children by the Syariah High Court. Subsequently, on 19 September 2013, the Syariah High Court granted permanent custody order of the two children to the ex-husband but allowed the ex-wife to have visitation rights and access to the two children.

[6] In the meantime, the ex-wife on 12 December 2013, filed a petition for divorce at the Seremban civil High Court and for the custody of the two children. On 7 April 2014, the civil High Court dissolved the civil marriage

between the ex-husband and ex-wife and granted permanent custody of the two children to the ex-wife. The ex-husband was granted weekly access to the children.

[7] On 11 April 2014, the ex-husband filed a notice of appeal against the decision of the High Court Judge in granting the custody of the two children to the ex-wife.

[8] Earlier, on 9 April 2014 another event unfolded. Mithran was taken away from the ex-wife's house by the ex-husband. The ex-wife then applied for recovery order before the civil High Court pursuant to s. 53 of the Child Act 2001 (Child Act). The High Court Judge granted the ex-wife's application and made the following orders against the Inspector General of Police (IGP) and/or his officers:

(a) to enter the ex-husband's residence or Taska ABIM Nur Ehsan or any premise in order to recover the child Mithran;

(b) to take custody of Mithran and to return the child to the custody and control of the ex-wife immediately;

(c) to remove Mithran from the custody of the ex-husband or from anyone having custody and control of Mithran; and

(d) to execute the High Court judgment irrespective of the Syariah Court order which had granted custody to the ex-husband.

[9] Aggrieved with the recovery order, the ex-husband also filed an appeal to the Court of Appeal.

[10] The appeals by the ex-husband against the custody order as well as the recovery order were heard jointly by the Court of Appeal. Before the hearing of the appeals, the Attorney General and the IGP applied to intervene in respect of the recovery order appeal. The Attorney General and the IGP in justifying their intervention stated that the decision of the civil High Court on the recovery order had raised issues which concern the public interest, namely:

(a) the interpretation of ss. 52 and 53 of the Child Act 2001 as to whether a recovery order can be made when there exists a custody order given by the Syariah Court in favour of the ex-husband;

(b) the jurisdiction of the civil court and the Syariah Court in respect of custody orders and whether the civil court prevails over the Syariah Court; and

(c) whether the civil court can exercise supervisory jurisdiction over the Syariah Court.

[11] The application to intervene by the Attorney General and IGP was allowed by the Court of Appeal.

[12] On 17 December 2014, the Court of Appeal dismissed both appeals. The Court of Appeal affirmed the decision of the civil High Court in respect of the custody order as well as the recovery order.

[13] On 14 January 2015, the Federal Court allowed the ex-husband's applications *vide* Application No: 08-747-12-2014 and 08-748-12-2014, which were heard together with the Attorney General's Application No: 08-7-01-2015, for leave to appeal to this court on the two questions of law as stated earlier.

[14] We will now deal with the two questions of law in turn.

Question 1

Whether In The Context Of Art. 121(1A) Of The Federal Constitution, Where A Custody Order Is Made By The Syariah Court Or The Civil High Court, On The Basis That It Has Jurisdiction To Do So, Whether There Is Jurisdiction For The Other Court To Make A Conflicting Order.

[15] The above question raised the issue of conflict of jurisdiction between the civil courts and the Syariah Courts. Learned counsel for the ex-husband submitted that the civil High Court has no jurisdiction to grant the custody order of the children to the ex-wife. The reason being that the ex-husband and the children were already Muslims before the filing of the divorce petition and custody order for the children by the ex-wife at the civil High Court. It was argued that the Syariah High Court had rightly exercised its jurisdiction in dissolving the ex-husband's marriage with the ex-wife and thereafter granting the custody of the children to the ex-husband. Since the matter is within the jurisdiction of the Syariah Court, the civil court has no jurisdiction in respect of the said matter. In support, learned counsel referred to us art. 121(1) and (1A) of the Federal Constitution which reads:

> (1) There shall be two High Courts of co-ordinate jurisdiction and status namely -
>
> (a) one in the states of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in the states of Malaya as the Yang di-Pertuan Agong may determine; and
>
> (b) one in states of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the states of Sabah and Sarawak as the Yang di-Pertuan Agong may determine,
>
> and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.
>
> (1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

[16] On the other hand, learned counsel for the ex-wife contended that art. 121(1A) would only apply when the Syariah Court has acted within its jurisdiction. It was submitted that in the instant case the Syariah High Court has no jurisdiction to make the custody order, as the civil court still retains the jurisdiction on the custody of the children of the civil marriage between the ex-husband and the ex-wife despite the ex-husband's conversion to Islam. In support, learned counsel referred to us s. 3(3) and s. 51 of the LRA which reads:

> 3.(3) This Act shall not apply to a Muslim or to any person who is married under Islamic law and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act; but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under section 51 from granting a decree of divorce on the petition of one party to a marriage where the other party has converted to Islam, and such decree shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam.
>
> 51.(1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce:
>
> Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversion.
>
> (2) The Court upon dissolving the marriage may make provision of the wife or husband, and for the support care and custody of the children of the marriage if any, and may attach any conditions to the decree of the dissolution as it think fit.

[17] The issue is whether the civil court still retains jurisdiction over the custody of the children of the civil marriage under the LRA despite the ex-husband's conversion to Islam. Section 3(3) of the LRA specifically excludes Muslims from its application except where a petition for a divorce is filed by the non-converting spouse against the converted spouse on the ground of conversion to Islam. It is provided for under s. 51 of the LRA that the conversion to Islam of one spouse can be a ground for the non-converting spouse to petition for divorce and seek ancillary reliefs.

[18] In *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1; [2008] 2 MLJ 147, Nik Hashim FCJ in dealing with s. 51 of LRA quoted the statement by Mohamed Dzaiddin, SCJ (as he then was) in *Tan Sung Mooi v. Too Miew Kim* [1994] 3 CLJ 708 at p. 29; [1994] 3 MLJ 117 at p. 167:

> The legislature, by enacting s. 51 clearly envisaged a situation that where one party to non-Muslim marriage converted to Islam, the other party who has not converted may petition to the High Court for divorce and seek ancillary reliefs. Further, it would seem to us that Parliament in

enacting subsection 51(2), must have had in mind to give protection to non-Muslim spouses and children of the marriage against a Muslim convert. A

[19] Nik Hashim, FCJ went further and stated at p. 30 (CLJ); p. 168 (MLJ) that:

The husband could not shield himself behind the freedom of religion clause under art. 11(1) of the FC to avoid his antecedent obligations under 1976 Act on the ground that the civil court has no jurisdiction over him. It must be noted that both the husband and wife were Hindus at the time of their marriage. Therefore, the status of the husband and wife at the time of registering their marriage was of material importance, otherwise the husband's conversion would cause injustice to the unconverted wife including the children. A non-Muslim marriage does not automatically dissolve upon one of the parties converted to Islam. Thus, by contracting the civil marriage, the husband and wife were bound by the 1976 Act in respect of divorce and custody of the children of the marriage and thus, the civil court continues to have jurisdiction over him, notwithstanding his conversion to Islam. B C D

[20] In *Tan Sung Mooi v. Too Miew Kim* (*supra*), the issue was whether the High Court was entitled to exercise its continuing jurisdiction to grant the ancillary relief in view of the conversion of the husband to Islam. The then Supreme Court answered it in the affirmative. Mohamad Dzaiddin SCJ (as he then was) speaking for the Supreme Court at p. 713 (CLJ); p. 124 (MLJ) said: E

From the wording of s. 51(2) of the Act, the legislature clearly intended to provide ancillary reliefs for non-Muslim spouses and the children of the marriage as a result of one party's conversion to Islam. In our opinion … the High Court … has jurisdiction to hear and determine the ancillary issues … It would result in grave injustice to non-Muslim spouses and children whose only remedy would be in the civil courts if the High Court no longer has jurisdiction, since Syariah Courts do not have jurisdiction over non-Muslims. In the context of the legislative intent of s. 3 and the overall purpose of the Act, the respondent's legal obligation under a non-Muslim marriage cannot surely be extinguished or avoided by his conversion to Islam. F G

[21] Thus, the issue is not new. The civil courts had consistently held that the converted spouse cannot use his conversion to Islam to escape responsibilities under the LRA. (Also see *Tey Siew Choo v. Teo Eng Hua* [1999] 6 CLJ 308, *Kung Lim Siew Wan lwn. Choong Chee Kuan* [2003] 3 CLJ 482; [2003] 6 MLJ 260 and *Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah* [2004] 1 CLJ 505; [2004] 2 MLJ 241). H

[22] We have no reason to depart from the earlier decisions. We are of the same view that a non-Muslim marriage does not automatically dissolve upon one of the parties converting to Islam. The civil courts continue to have jurisdiction in respect of divorce as well as custody of the children despite the conversion of one party to Islam. I

[23] In the present case, the ex-husband and the ex-wife were Hindus at the time of their marriage. By contracting the civil marriage under the LRA they are bound by its provisions in respect of divorce as well as custody of the children of the marriage. Matters under the LRA are within the jurisdiction of the civil courts and the civil courts continue to have jurisdiction over them, notwithstanding the ex-husband's conversion to Islam. Thus, the matter of dispute between the ex-husband and the ex-wife in this case is not a matter within the jurisdiction of the Syariah High Court. It follows that art. 121(1A) which removes the jurisdiction of the civil courts in respect of any matter within the jurisdiction of the Syariah Courts does not operate to deny the civil courts jurisdiction in respect of the matters set out in s. 51 of the LRA.

[24] In *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 CLJ 253; [2007] 5 MLJ 101, this court through Abdul Hamid Mohamad FCJ (as he then was) had clearly explained the legislative history behind the insertion of art. 121(1A) of the Federal Constitution where he said:

> [50] Something should be said about cl. (1A) of art. 121. This clause was added by Act A704 and came into force from 10 June 1988. As explained by Professor Ahmad Ibrahim, who I would say was the prime mover behind this amendment in his article "The Amendment of Article 121 of the Federal Constitution: Its effect on the Administration of Islamic Law" [1989] 2 MLJ xvii:
>
> > One important effect of the amendment is to avoid for the future any conflict between the decisions of the Syariah Courts and the Civil Courts which had occurred in a number of cases before. For example, in *Myriam v. Ariff* …
>
> [51] Prior to the establishment of the syariah courts, custody of children, Muslim and non-Muslim, was within the jurisdiction of the civil courts. Then the syariah courts were established with jurisdiction regarding custody of Muslim children, pursuant to the provision of the State List. However, in *Myriam v. Mohamed Arif*, the High Court held that it still had jurisdiction regarding custody of Muslim children. Hence the amendment.
>
> [52] Actually if laws are made by Parliament and the Legislatures of the States in strict compliance with the Federal List and the State List and unless the real issues are misunderstood, there should not be any situation where both courts have jurisdiction over the same matter or issue. It may be that, as in the instant appeal, the granting of the letters of administration and the order of distribution is a matter within the jurisdiction of the civil court but the determination of the Islamic law issue arising in the petition is within the jurisdiction of the Syariah Court. But, these are two distinct issues, one falls within the jurisdiction of the Civil Court and the other falls within the jurisdiction of the syariah court. Still, there is a clear

division of the issues that either court will have to decide. So, there is no question of both courts having jurisdiction over the same matter or issue.

[53] Of course, such a situation can arise where the Legislature of a State makes law that infringes on matters within the Federal List. I am quite sure that there are such laws made by the Legislatures of the States after the introduction of cl. (1A) of art. 121 even though I shall refrain from mentioning them in this judgment. In such a situation the Civil Court will be asked to apply the provision of cl. (1A) of art. 121 to exclude the jurisdiction of the Civil Court. The Civil Court should not be influenced by such an argument. Clause (1A) of art 121 was not introduced for the purpose of ousting the jurisdiction of the Civil Courts. The question to be asked is: Are such laws constitutional in the first place? And the constitutionality of such laws are a matter for the Federal Court to decide - art 128.

[25] It is clear that art. 121(1A) was introduced not for the purpose of ousting the jurisdiction of the civil courts. It was introduced in order to avoid any conflict between the decision of the Syariah Courts and the civil courts which had occurred in a number of cases before. In the present case, the conflict arose because the ex-husband had brought his case to the Syariah High Court. But as discussed earlier, the LRA continues to bind the ex-husband despite his conversion to Islam. The Syariah Courts have no jurisdiction over the ex-husband's application to dissolve his civil marriage with the ex-wife. Neither have the Syariah Courts jurisdiction over custody of the children born from the civil marriage under the LRA. The Syariah Courts have jurisdiction only over matter relating to divorce and custody when it involves a Muslim marriage, solemnised according to Muslim Law. When one of the parties is a non-Muslim, the Syariah Courts do not have the jurisdiction over the case even if the subject matter falls within their jurisdiction.

[26] Thus, it is important for the civil courts and Syariah Courts not to transgress into each other's jurisdiction. It is also important to note that both the Syariah Courts and the civil courts are creatures of statutes and they owe their existence to the Federal Constitution, the Acts of Parliament and the State Enactments. It should be to these relevant statutes that both courts should look to in determining whether they have jurisdiction or not. As rightly pointed by Abdul Hamid Mohamad FCJ (as he then was) in *Latifah Mat Zin* (*supra*) that if laws made by Parliament and the Legislature of the State are in strict compliance with the Federal List and State List, then there should not be any situation where both courts have jurisdiction over the same subject matter.

[27] In the present case, the Syariah High Court had granted the dissolution of the civil marriage between the ex-husband and the ex-wife pursuant to s. 46(2) of the Islamic Family Law (Negeri Sembilan) Enactment 2003 (Enactment 2003) which reads:

A (2) The conversion to Islam by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the Court.

[28] With respect to the learned Syariah High Court Judge, if he had not confined himself only to s. 46(2) of the Enactment 2003, but instead referred B to s. 4 and s. 45 of the Enactment 2003 he would have realised that the Syariah Court has no jurisdiction to entertain the ex-husband's application to dissolve the marriage. Sections 4 and 45 provide as follows:

4. Application

C Save as otherwise expressly provided, this Enactment shall apply to all Muslim living in the State of Negeri Sembilan and to all Muslims resident in the State of Negeri Sembilan who are living outside the state.

45. Extent of power to make any order

Save as is otherwise expressly provided, nothing in this Enactment shall D authorise the Court to make an order of divorce or an order shall authorise the Court make an order of divorce or an order pertaining to a divorce (SIC) or to permit a husband to pronounce a *talaq* except:

(a) where the marriage has been registered or is deemed to be registered under this Enactment;

E (b) where the marriage was solemnised in accordance with Hukum Syarak; or

(c) where the residence of either of the parties to the marriage at the time when the application is presented is in the State of Negeri Sembilan.

F **[29]** It is clear that s. 4 specifically provides that Enactment 2003 is applicable only to Muslims. Furthermore s. 45 provides that the Syariah Court can only grant orders pertaining to divorce or allows the pronouncement of *talaq* by the husband where the marriage is registered or deemed to be registered under Enactment 2003 or that the marriage was solemnised in accordance to G the Syariah Law. In the present case, the marriage between the ex-husband and the ex-wife was not registered under Enactment 2003. Neither was the marriage solemnised in accordance with the Syariah Law. The marriage was a civil marriage in accordance with the LRA. Thus, it is the LRA that determines the jurisdiction pertaining to the dissolution of marriage between H the ex-husband and the ex-wife and any ancillary reliefs thereto.

[30] Section 46(2) of the Enactment 2003 is in *pari materia* with s. 46(2) of the Islamic Family Law (Federal Territories) Act 1984 which was dealt with by Abdul Aziz Mohamad FCJ in *Subashini Rajasingam* (*supra*) where he held that s. 46(2) of the Islamic Family Law (Federal Territories) Act 1984 does I not enable a Syariah Court to bring about a dissolution of a non-Muslim marriage where a party to it has converted to Islam. In the words of the learned judge:

> … It is obvious from the very wording of the section that it is predicated on the supposition that in Islamic law the conversion of a party to Islam by itself may or does not operate to dissolve the marriage. The section prevents the supposition from having a legal effect unless and until it is confirmed by the Syariah Court. What the Syariah Court does under the section is merely to confirm that the conversion has operated to dissolve the marriage. It is confirmation of the consequence on the marriage, according to Islamic law, of the act of one of the parties. The Syariah Court does not do anything under s. 46(2) to bring about the dissolution of the marriage. It merely confirms that a dissolution has taken place by reason of conversion. I agree with the wife that s. 46(2) does not confer jurisdiction on the Syariah Courts to dissolve a non-Muslim marriage. In relation to that section, therefore cl. (1A) of art. 121 does not apply to deprive the High Court of jurisdiction under s. 51 of the Law Reform Act.

[31] We adopt the same view. Thus, on the facts of this case, the Syariah High Court has no jurisdiction to dissolve the civil marriage between the ex-husband and the ex-wife and to make an order granting custody of the two children out of the marriage to the ex-husband. The jurisdiction to do that is with the civil court. In consequence, the Syariah Court's order in dissolving the marriage between the ex-husband and the ex-wife and granting custody of the children to the ex-husband is of no effect due to want of jurisdiction.

[32] Based on the above, Question 1 as posed to us in this appeal may now be answered this way. The civil courts have the exclusive jurisdiction to grant decrees of divorce of a civil marriage under the LRA and to make all other ancillary orders including custody care and access of the children born out of that marriage and all other matters ancillary thereto. It is an abuse of process for the spouse who has converted to Islam to file for dissolution of the marriage and for custody of the children in the Syariah Courts. This is because the dispute between parties is not a matter within the exclusive jurisdiction of the Syariah Courts. Therefore, art. 121(1A) of the Federal Constitution which deprives the civil courts' jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts is not applicable in this case.

[33] The next crucial issue is whether the High Court order, which was affirmed by the Court of Appeal, granting custody of the children to the ex-wife was a proper exercise of discretion. It is settled law that the paramount consideration in determining the custody of a child is the child's welfare. The wordings of s. 88(3) of the LRA pronounce this consideration in clear terms. Section 88(3) of the LRA reads:

> There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

[34] However, the presumption that a young child is better off with his or her mother rather than his or her father is a rebuttable presumption. That presumption is not on its own necessarily a decisive factor. It must be weighted together with other factors relevant and the first and paramount consideration must be the welfare of the child.

[35] The phrase "first and paramount consideration" is not elaborated upon by the LRA. But we can seek guidance from some of the decided cases to appreciate the scope of that phrase. In one classical English case of *J & Anor v. C & Ors* [1970] AC 688, Lord MacDermott in dealing with that phrase said:

> I think it connotes a process whereby, when all relevant facts, relationship claims and wishes of the parents, risks, choices and other circumstances are take into account and weighed, the course to be followed will be that which is most in the interest of the children's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.

[36] Lord MacDermott's approach above was cited with approval by the Federal Court in *Mahabir Prasad v. Mahabir Prasad* [1981] CLJ 124A; [1981] CLJ (Rep) 65; [1982] 1 MLJ 189. Earlier, the Federal Court in the case of *Teh Eng Kim v. Yew Peng Siong* [1977] 1 LNS 138; [1977] 1 MLJ 234, had expressed the view that the maintenance of a stable and secure home in which the children can enjoy love and affection seemed to be the most important element that should be taken into consideration.

[37] However, this does not mean that the court should not take other relevant factors into consideration. Indeed, in order to accord the welfare of a child as of paramount importance it is necessary to take into account such matters as the conduct of the parties, their financial and social status, the sex and age of the child, his/her wishes as far as they can be ascertained depending on the age of the child, the confidential reports of a social welfare officer and whether in the long run it would be in the greater interest, welfare and happiness of the child to be with one parent rather than the other. This position is fortified through s. 88(2) of the LRA which clearly provides:

> In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard -
>
> (a) to the wishes of the parents of the child, and
>
> (b) the wishes of the child, where he or she is of an age to express an independent opinion.

[38] In evaluating the independent opinion express by the child, the court would normally follow the opinions given if those opinions are consistent with the interests of the child. In the case of *Re KO (an infant)* [1990] 1 LNS 8; [1990] 1 MLJ 494 Edgar Joseph Jr had this to say:

> … I reminded myself that how influential an infant's wishes are will clearly depend upon the extent to which they coincide with his best interests in the opinion of the court.

[39] Whilst considering the wishes of the child, the court must always take into consideration on the possibility that the child might have been influenced by the people surrounding the child. This matter was addressed in the case of *B Ravandran Balan v. Maliga Mani Pillai* [1995] 1 LNS 21; [1996] 2 MLJ 150, where the court did not follow the views of the child as the court commented that in all probability the child was influenced by material gains promised to be given or already given by the father.

[40] The question now is at which age can a child be considered as being capable enough to express an independent opinion? The Federal Court in the case of *Manickam v. Intherahnee* [1984] 1 LNS 90; [1985] 1 MLJ 56 ruled that a child of eight years who was in the custody of the father and the father's family could not reasonably be expected to express any independent opinion on his preferences. However, in *Mahabir Prasad* (*supra*), the court gave the opportunity to the children aged seven and half and eight and half years to express their opinion.

[41] Both cases mentioned above reflect the position that a determination as to whether a child is able to express an independent opinion depends greatly on the circumstances peculiar to the facts of the case and the assessment of the judge of those circumstances. From the cases that have been decided, it may be reasonable to suggest here that the children above the age of seven can be presumed, subject to being rebutted and other extrinsic factors closely related to the case, to be capable of giving independent opinion.

[42] Whilst s. 88(2) of the LRA requires the court to have regard to the wishes of the parents of the child, the question arises as to how far the wishes of the parents should be followed by the court. The Federal Court in the case of *Teh Eng Kim v. Yew Peng Siong* (*supra*) observed as follows:

> as the welfare of the children is the paramount consideration, the welfare of these three children prevails over parental claim … Parental rights are overridden if they are in conflict with the welfare of the child.

[43] It can be said that the wishes of the parents will not be of much significance unless it can be shown that those wishes are in line with the welfare of the child. Nonetheless, if the welfare of the child is equally balanced with either the wishes of the parents, the wishes of the relevant parents might tip the scale.

[44] Taking all the above into consideration, the question is whether the custody order of the High Court as affirmed by the Court of Appeal should be preserved. As stated earlier, the High Court Judge had granted custody, care and control of the children to the ex-wife, with access given to the ex-husband every week on Sundays from 9am until 6pm under the

supervision of the ex-wife at the ex-wife's house. According to the High Court Judge, such orders were given after taking due consideration to, *inter alia*, the fact that the ex-wife had taken care of the children ever since birth; the ex-husband could not provide a conducive environment for the children; that the ex-husband was involved in criminal activities; that the status quo of the children should be maintained and that the children had clearly expressed their desire to be with their mother.

[45] It is a settled law that a custody order is never final or irreversible. The Federal Court in *Mahabir Prasad v. Mahabir Prasad* (*supra*) had explained:

> Changes of circumstances, in our view may be brought into the picture to reverse a previous decision of the same court … In such a case the matter is never *res judicata*. A custody order is not final and conclusive. If any change has taken place in the circumstances of the parties which warrants a reconsideration of the matter, the court is not bound by a former order, but will use its discretion with respect to the altered conditions, always bearing in mind the fact that the welfare of the infants are the paramount consideration.

[46] In the present case, a change in the circumstances had occurred. Two days after the custody order, Mithran was taken away from the ex-wife's house by the ex-husband. Since then Mithran has been with the ex-husband while Shamila remained with the ex-wife. Bearing in mind that the welfare of the children is the paramount consideration, we have, taken the liberty to see both the children in our chambers in order to determine whether their wishes to be with their mother remained the same.

[47] Mithran is now eight years old. He introduced himself as Nabil bin Abdullah. We found him capable enough to express his independent opinion and to decide his preference whether to live with his father or mother. He told us in clear terms that he is very happy to live with his father. He also told us that he does not wish to live with his mother.

[48] Shamila is now eleven years old. We found her to be matured enough to express her independent opinion and to decide her preference whether to live with his father or mother. She told us without hesitation that she prefers to live with her mother rather than her father. She also informed us that she is now residing with her mother in Johor Bahru, and is a student at an international school there. She said she is very happy to be with her mother and does not wish to live with her father.

[49] Thus, we found that both children are certain of their choices. We also found both children have settled down and are well cared for respectively. We are of the view that taking into consideration the welfare of the children as of paramount importance, it is undesirable to disturb the present arrangement. In the circumstances, we have to vary the custody order granted by the High Court by making an order that the custody of Shamila remained with the ex-wife while custody of Mithran to be with the ex-husband.

[50] With regard to right of access to both children, it is commendable that the parties have managed to work out the terms and accordingly we have recorded a consent order on the terms as agreed by the parties. Similarly, the parties have agreed that the monthly maintenance order of RM500 to be paid by the ex-husband to the ex-wife be varied to RM250, as Mithran is now with the father since the order was made.

Question 2

Whether On The Interpretation Of Ss. 52 And 53 Of The Child Act 2001, A Recovery Order Can Be Made When There Exists A Custody Order Given By The Syariah Court Which Is Enforceable At The Same Time.

[51] As stated earlier, the High Court had allowed the ex-wife's application for the recovery of the child Mithran from the ex-husband's custody. In allowing the ex-wife's application for the recovery order, against the IGP and/or his offices the High Court ordered the following:

(a) to enter the ex-husband's residence or Taska ABIM Nur Ehsan or any premises in order to recover the child, Mithran;

(b) to take custody of Mithran and to return the child to the custody and control of the ex-wife immediately;

(c) to remove Mithran from the custody of the ex-husband or from anyone having custody or control of Mithran; and

(d) to execute the High Court judgment irrespective of the Syariah Court order which had granted custody to the ex-husband.

[52] The application for the recovery order was made pursuant to ss. 52 and 53 of the Child Act which read:

> 52(1) Any parent or guardian who -
>
> (a) does not have the lawful custody of a child; and
>
> (b) takes or sends out a child, whether within or outside Malaysia,
>
> without the consent of the person who has the lawful custody of the child commits an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.
>
> (2) A person has lawful custody of a child under this section if he has been conferred custody of the child by virtue of any written law or by an order of a Court, including a Syariah Court.
>
> (3) …
>
> 53(1) If it appears to the Court that there is reason to believe that a child had been taken or sent away without the consent of the person who has lawful custody of the child as described in section 52 the Court may make a recovery order.

A (2) A recovery order may be made by the Court on application being made by or on behalf of any person who has the lawful custody of the child.

(3) For the purposes of this section, a "recovery order" may -

B (a) direct any person who is in a position to do so to produce the child on request to any authorised person;

(b) authorise the removal of the child by any authorised person;

(c) require any person who has information as to the child's whereabout to disclose that information to the authorised person;

C

(d) authorise any police officer to enter into any premises specified in the order and search for the child, using reasonable force if necessary.

(4) …

D **[53]** It is clear from the above that a recovery order is only applicable in circumstances provided for in s. 52 and can only be obtained if the elements in s. 53 are fulfilled. From the reading of s. 53(1) and (2), it is clear that the requirements to be fulfilled to obtain a recovery order are:

E (a) the court has reason to believe that a child has been taken or sent away; and

(b) the act is done without the consent of the person who has lawful custody of the child.

[54] Section 52(2) of the Child Act explains the meaning of the phrase F "lawful custody of a child". A person is said to have lawful custody of a child if he has been conferred custody of the child by virtue of any written law or by an order of a court including a Syariah Court. It is clear from s. 52(2) that a custody order by the Syariah Court is a lawful custody order.

G **[55]** In the present appeal, there are two custodial orders. One was the Syariah High Court's order dated 19 September 2013, which granted custody of the children to the ex-husband. The other was the civil High Court's order dated 7 April 2014, which gave custody of the children to the ex-wife. We are of the view that in light of the existence of the two conflicting custodial orders, the High Court Judge should not have entertained the application of H the ex-wife for the recovery of Mithran from the ex-husband. We acknowledge that by our decision in relation to Question 1 above, the Syariah Courts have no jurisdiction in this case to make the custody order. However, Syariah Court order remained a valid order until it is set aside. Thus, with respect, the High Court Judge, cannot direct the IGP or his officers to execute the I High Court judgment, irrespective of the Syariah High Court order.

[56] Thus, on the facts of this case, both the Syariah High Court order and civil High Court order bind the IGP and his officers either way. Clearly, the execution and performance of one order is impossible without being in contempt of the other.

[57] In conclusion, we are of the view that on the facts and circumstances of this case, the recovery order should not have been given because the pertinent element under s. 52 of the Child Act had not been fulfilled. Accordingly, we would answer Question 2 in the negative.

[58] We, therefore allow the appeal on the recovery order. The orders of the courts below are set aside.

[59] In the circumstances of this case, we make no order as to costs. Deposits of these appeals to be refunded to the ex-husband.